

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARVIN HARRIS,

Plaintiff,

v.

J. McCALL, et al.,

Defendants.

Case No.: C 14-0952 CW (PR)

ORDER GRANTING DEFENDANTS'
MOTION TO REVOKE PLAINTIFF'S IN
FORMA PAUPERIS STATUS AND
DISMISSING COMPLAINT

Plaintiff, a state prisoner incarcerated at New Folsom State Prison, has filed a pro se civil rights action pursuant to 42 U.S.C. § 1983, alleging the violation of his constitutional rights by employees at Salinas Valley State Prison, where he was formerly incarcerated. On April 4, 2014, the Court issued an Order of Service. The Court granted Plaintiff's motion to proceed in forma pauperis (IFP). On June 11, 2014, Defendants filed a motion, under 28 U.S.C. § 1915(g), to revoke Plaintiff's IFP status. The motion is fully briefed. For the reasons discussed below, this motion is granted.

DISCUSSION

I. Legal Standard

A prisoner may not bring a civil action IFP under 28 U.S.C. § 1915 "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

1 For purposes of a dismissal that may count under § 1915(g),
2 the phrase "fails to state a claim on which relief may be granted"
3 parallels the language of Federal Rule of Civil Procedure 12(b)(6)
4 and carries the same interpretation, the word "frivolous" refers
5 to a case that is "'of little weight or importance: having no
6 basis in law or fact,'" and the word "malicious" refers to a case
7 "filed with the 'intention or desire to harm another.'" Andrews
8 v. King, 398 F.3d 1113, 1121 (9th Cir. 2005) (citation omitted).

9 Only cases within one of these three categories can be counted as
10 strikes for § 1915(g) purposes, so the mere fact that a plaintiff
11 has filed many cases does not alone warrant dismissal under
12 § 1915(g). Id. Rather, dismissal of an action under § 1915(g)
13 should only occur when, "after careful evaluation of the order
14 dismissing an [earlier] action, and other relevant information,
15 the district court determines that the action was dismissed
16 because it was frivolous, malicious or failed to state a claim."

17 Id.

18 II. Plaintiff's Strikes

19 Defendants request judicial notice of court records from four
20 prior cases that Plaintiff brought in federal court: (1) Harris v.
21 Edmonds, No. CV-F-00-5857 OWW LJO (E.D. Cal.) (dismissed on Nov.
22 27, 2000); (2) Harris v. Hickey, No. CV-F-97-5411 OWW HGB (E.D.
23 Cal.) (dismissed on Aug. 8, 1997); (3) Harris v. Hickey, No. CV-F-
24 97-5186 REC-HGB (E.D. Cal.) (dismissed on Jul. 30, 1997); and
25 (4) Harris v. Kenwood, No. 2:11-cv-2388-WBS-CMK (E.D. Cal. Jan. 6,
26 2014). The request for judicial notice of these court records is
27 GRANTED. See Fed. R. Evid. 201(b)(2); United States v. Wilson,
28 631 F.2d 118, 119 (9th Cir. 1980) (court may take judicial notice

1 of public records, including its own records and records of other
2 courts).

3 In Harris v. Kenwood, the Eastern District of California
4 found that Plaintiff filed three previous lawsuits that qualify as
5 strikes under 28 U.S.C. § 1915(g) and, therefore, denied his
6 request to proceed IFP. See Req. Judicial Not., Ex. D.

7 The Court reviews the three cases noted in Kenwood, and finds
8 that they qualify as strikes. The claims in Harris v. Edmonds
9 were dismissed on the grounds that Plaintiff failed to state a
10 claim upon which relief could be granted and failed to satisfy
11 pleading requirements. See Req. Judicial Not., Ex. A. This
12 qualifies as a strike under § 1915(g).

13 The claims in Harris v. Hickey, No. CV-F-97-5411 OWW HGB,
14 were dismissed as frivolous. See Req. Judicial Not., Ex. B. This
15 qualifies as a strike under § 1915(g). Likewise, the claims in
16 Harris v. Hickey, No. CV-F-97-5186 REC-HGB, were dismissed as
17 frivolous. See Req. Judicial Not., Ex. C. This also qualifies as
18 a strike under § 1915(g).

19 Based on the foregoing, Defendants have shown that Plaintiff
20 has suffered at least three "strikes" under § 1915(g). In
21 opposition, Plaintiff does not contest that any of the "strikes"
22 at issue were properly dismissed. Instead, he argues that he has
23 paid the filing fee under Title 15, section 3160 of the California
24 Code of Regulations. Section 3160 provides that an inmate filing
25 a civil action in state court is charged filing fees against his
26 prison trust account but, if he is without sufficient funds at the
27 time of the charge, he shall not be charged for any remaining
28 balance. This argument fails because section 3160 applies to

1 state court filings, not to this federal action. Further,
2 Plaintiff filed a motion to proceed IFP in this case, which the
3 Court granted.

4 III. Imminent Danger Exception

5 The plain language of the imminent danger clause in § 1915(g)
6 indicates that "imminent danger" is to be assessed at the time of
7 filing, not at the time of the alleged constitutional violations.
8 Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (3d Cir. 2001) (en
9 banc). "Imminent danger" may include an ongoing danger of serious
10 physical injury. Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir.
11 1998). Plaintiff has the burden of proving that he is in imminent
12 danger or subject to an ongoing danger of serious physical injury
13 at the time he filed this action.

14 In his complaint, Plaintiff alleges that Defendants
15 retaliated against him by taking some of his property, altering
16 his criminal record and falsely accusing him. None of these
17 allegations demonstrate that Plaintiff was under imminent danger
18 or subject to an ongoing danger of serious bodily injury at the
19 time he filed his complaint. Plaintiff does not argue to the
20 contrary.

21 Based on the foregoing, Plaintiff is not entitled to the
22 exception under § 1915(g), and is barred from proceeding IFP in
23 this action. Defendants' motion to revoke Plaintiff's IFP status
24 is granted.

25 When IFP status is revoked pursuant to § 1915(g), the proper
26 procedure is to dismiss the action without prejudice to re-filing
27 with payment of fees at the time the action is re-filed. See
28 Tienerney v. Kupers, 128 F.3d 1310, 1311 (9th Cir. 1998) (under

1 § 1915(g), case was properly dismissed without prejudice to re-
2 filing with payment of filing fees).

3 CONCLUSION

4 Based on the foregoing, the Court orders as follows:

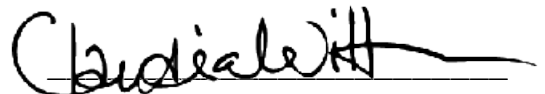
5 1. Defendants' motion for revocation of Plaintiff's IFP
6 status is granted. Doc. No. 19. The Order entered on July 9,
7 2014 (Doc. No. 24), granting Plaintiff leave to proceed IFP, is
8 VACATED and Plaintiff's IFP status is REVOKED.

9 2. This case is dismissed without prejudice to Plaintiff's
10 re-filing it with payment of the \$400 filing fee.

11 3. The Clerk of the Court shall terminate all motions and
12 close the file.

13 IT IS SO ORDERED.

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15 Dated: October 3, 2014



16 CLAUDIA WILKEN
17 UNITED STATES DISTRICT JUDGE
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